STATES OF JERSEY

DRAFT CRIMINAL PROCEDURE (JERSEY) LAW 201- (P.118/2017): FURTHER COMMENTS

Presented to the States on 16th March 2018
by the Education and Home Affairs Scrutiny Panel

STATES GREFFE

FURTHER COMMENTS

Introduction

1. The Education and Home Affairs Scrutiny Panel ("the Panel") established a Sub-Panel in order to review P.118/2017 – the Draft Criminal Procedure (Jersey) Law 201- ("the draft Law"), which was lodged for debate by the Council of Ministers on 5th December 2017. The debate on the principles of the draft Law took place on 16th January 2018, after which it was called in for further scrutiny by the Panel under Standing Order 72.

2. Prior to the debate on the principles of the draft Law, the Sub-Panel produced Comments which contained the membership of the Sub-Panel, its Terms of Reference and details of the areas it had identified for further scrutiny. Since then, the Sub-Panel has extensively reviewed the draft Law, and in doing so has undertaken the following work –

   i. A briefing from H.M. Attorney General and Officers from the Community and Constitutional Affairs Department.

   ii. The Sub-Panel wrote to a wide variety of stakeholders within the criminal justice system and, in doing so, received significant submissions from the following people and organisations –

   - The Bailiff of Jersey
   - Sir Michael Birt and Mr. Julian Clyde-Smith (Commissioners of the Royal Court
   - Sir Christopher Pitchers (retired Commissioner of the Royal Court)
   - The Law Society of Jersey.

   iii. A comprehensive list of all of the submissions received by the Sub-Panel can be found here.

   iv. In response to the submissions received, the Sub-Panel held Public Hearings and meetings with the following –

   - The Bailiff of Jersey (6th February 2018) – Public Hearing
   - The Law Society of Jersey (7th February) – private meeting
   - Sir Michael Birt and Mr. Julian Clyde-Smith (13th February) – Public Hearing
   - The Magistrate and Assistant Magistrate (23rd February) – private meeting.

   v. The Sub-Panel met with the Attorney General and the Law Officers to discuss the issues raised as a result of the submissions.

   vi. The Sub-Panel held a Public Hearing with the Minister for Home Affairs on Friday 23rd February 2018.

3. Throughout its review of the draft Law, and from the submissions received, the Sub-Panel identified several key areas that required further examination. The Sub-Panel has therefore focussed predominantly on the following areas of the draft Law –

i. Article 75 – This particular Article makes provision for the Attorney General to call for a retrial in the event of a hung jury. A hung jury can only happen in the event that a jury is unable to reach a majority verdict. In current Jersey law, should a jury be unable to reach a majority verdict, then the defendant is acquitted.

ii. Article 84 and Article 85 – these Articles outline the duty of the defence to give a "defence case statement" prior to any trial commencing, and lay out the necessary contents of such a statement.

iii. Article 66 – this particular Article allows for the introduction of reserve jurors that would be able to take up a seat on the main jury in the event that the number of jurors falls.

iv. Article 63 – this Article describes the composition and nature of a jury.

v. Article 82 – the Article allows the Attorney General to recommence criminal proceedings with the leave of the court.

vi. Article 83 – this Article prescribes the procedures that must be followed by the prosecution when disclosing unused material to the defence.

vii. Article 98 – this lays out the procedure for dealing with witnesses that fail to attend court.

viii. Schedule 3 – Part 9A – Evidence of Bad Character – this puts forward changes to the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("PPCE Law") to allow for the admissibility of evidence of bad character when an attack is made on another person's character.

4. From the outset, the Sub-Panel has received almost unanimous agreement from submissions that this draft Law is necessary in order to modernise Jersey's criminal justice system. It is true that the current criminal procedure law (*Loi (1864) Réglant la Procédure Criminelle*) is in need of updating, and this draft Law brings together all the aspects of Jersey's criminal procedure legislation into one statute.

5. However, it was clear that areas included in the draft Law needed further scrutiny to ensure they are fit for purpose.

6. From the outset of the review, and in order to maintain openness and transparency, Deputy R.J. Renouf of St. Ouen declared that he is a member of the Law Society of Jersey.

The Panel's amendment to the draft Law

7. As Members will be aware, the Sub-Panel has lodged an amendment (P.118/2017 Amd.) to the draft Law in respect of the issue of retrials as prescribed in Article 75. Throughout the submissions received by the Sub-Panel, it was clear that there was a great deal of concern over the introduction of this change in the Island. The Sub-Panel has identified 3 main concerns over the introduction of retrials, which it has explained in detail in the report accompanying its proposed amendment to the draft Law. The main issues identified are as follows –

i. In order for a retrial to comply with the overriding objective of the draft Law (to ensure that cases in criminal proceedings are dealt with justly), it has been suggested that it will need to take place as soon as possible after the initial trial. This has raised concerns over the publicity of the case that could prevent impartial jurors from being empanelled for the retrial.

ii. Evidence received by the Sub-Panel has suggested that the resource implications for the Royal Court and Viscount's Department are likely to become a serious issue. Although it has been argued by the Minister for Home Affairs that the actual likelihood of retrials is rare, the Sub-Panel is not convinced that adequate consideration has been given to the likely resource implications of retrials.

iii. It has been raised with the Sub-Panel that retrials will create a shift in favour of the prosecution by allowing it to have 'another bite of the cherry' in certain circumstances. The Panel believes that if the prosecution case is not strong enough to prove beyond reasonable doubt that a defendant is guilty, and, if the overall goal of Article 75 is to encourage juries to reach unanimous verdicts, then adequate opportunity has been given to the prosecution.

Other areas examined by the Sub-Panel

8. The Sub-Panel has conducted further work on the areas as laid out in the introduction to this report. The issue of retrials has been brought forward in a separate amendment and, therefore, what follows is a summary of the other issues that have been addressed by the Sub-Panel during its review. As a result of this work, the Panel is pleased to note that the Minister for Home Affairs has brought forward amendments to address the majority of the issues.

Defence Case Statements – Article 84 and Article 85

9. The proposed introduction of defence case statements seeks to achieve the overriding objective of the draft Law by requiring all defendants to provide the particulars of the defence they shall be using during a case. In the event that a defence case statement is not made, then the Court (and Jury, etc.) are able to draw any inferences as seen fit.

10. Concerns were raised to the Sub-Panel by the Law Society of Jersey that this directly impacted the defendant's right to silence –

> *"The present proposal, whereby a Defendant has to indicate what his defence is in a written statement, seems difficult to reconcile with a Defendant's right to say nothing when interviewed by the Police nor even to give evidence and those of a cynical disposition may view the inclusion of this provision, as averted to above, as the precursor to the removal of the right to silence."*[1]

[1] Written submission – Law Society of Jersey – 12 January 2018

11. The Sub-Panel too held concerns about this change, in that the particulars of the defence case statement appeared to put further power into the hands of the prosecution. It was also questioned whether or not the defence would be able to place the burden on the prosecution to prove its case if this change was brought forward.

12. This particular change was discussed at length with H.M. Attorney General and the Law Officers' Department, where it was argued that the defence would have to raise its case at some point during a trial. In doing so, had a particular point not been raised earlier, there may be delays to the trial process to allow the prosecution to investigate the claims. It was also noted that the defence case statement allowed the Court to better manage the case, and would create a more efficient trial which was relevant to the issues in dispute.

13. The Sub-Panel questioned the rationale for defence case statements at a Public Hearing with the Minister for Home Affairs –

> **Deputy of St. Ouen:**
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> *We would like to move on to discuss defence case statements and this is an entirely new procedure required, we understand, and a failure by a defendant to produce a defence case statement could lead to an adverse inference being taken by the court and communicated to the jury. In other words: "Why has the defendant not taken the trouble to explain their defence beforehand?" Can you tell us the reasons for making that change in the law?*
>
> **Minister for Home Affairs:**
>
> *So the intention of introducing a defence case statement is in order to expedite the process of the court so that the so-called killer point is not saved until quite a way into the court proceedings and that causes difficulties for the other side. It avoids the potential for people to restrict their main point and prevent it from being properly argued in the court case, and so it has really been included to smooth the proceedings. But I think if you were referring to somebody who is representing themselves then there is a special case for that person not having quite the same imposition.*[2]

14. The Sub-Panel also questioned whether or not inclusion of a defence case statement would allow for adverse inferences to be drawn, if the defence intended solely to put the prosecution to proof –

> **Deputy of St. Ouen:**
>
> *They would still have the right to remain silent?*
>
> **Minister for Home Affairs:**
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> *There would be no adverse inference, and I think in England and Wales the right to remain silent without adverse inference has been removed and so there can be an adverse inference placed on the right to remain silent in other jurisdictions, but it has been decided to leave that in, in this Law.*[3]

[2] Public hearing with the Minister for Home Affairs – 23 February 2018 – p.18
[3] Public hearing with the Minister for Home Affairs – 23 February 2018 – p.19

15. In questioning whether defence case statements tipped the balance in favour of the prosecution, the Sub-Panel received the following answer:

> **Deputy of St. Ouen:**
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> *So the mischief that it sought to prevent is the defendant coming forward with an express defence, his own story, whether or not he gives evidence, in the course of the trial. Is that a fair balance of the rights of the defence and prosecution, bearing in mind the prosecution authorities are often the more empowered in that they have police resources and law officer resources?*
>
> **Minister for Home Affairs:**
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> *Some legal defences, I am sure, the teams would be quite sizable as well, but I appreciate that is not always the case. But I think in my mind it certainly seems right and proper that people have to declare their hand at the outset, and then there is a level playing-field and everybody knows what points they are arguing and it is clear, and that, to me, seems an expeditious way to proceed really because you are cutting out some time-wasting that could potentially be found in lack of clarity over what issues are being argued or not.*[4]

16. The issue of defence case statements has caused a great deal of debate amongst the Sub-Panel. Whilst it can be seen that this concept is of great importance to the draft Law and is central to the overriding objective, it is not clear whether this will infringe the right to silence for defendants. In the time available for the review, the Sub-Panel has not reached a clear consensus in respect of defence case statements.

17. A further issue was identified by the Sub-Panel in relation to Article 84(5), where the drafting could be seen to imply that the defence would be liable to pay the full costs of the prosecution in the event that a defence case statement was not provided. This, coupled with the duty of the defence to supply particulars of its case (and therefore, as some have suggested, negate the right to silence) was seen as heavily in favour of the prosecution. The Sub-Panel questioned this issue during a Public Hearing with the Minister for Home Affairs –

> **Deputy of St. Ouen:**
>
> *So if a defendant does not want to disclose his defence, it is understood he would run the risk of adverse comments, but he might also run the risk of having to pay prosecution costs. Minister, do you think that is fair?*
>
> **Minister for Home Affairs:**
>
> *I do, yes.*[5]

18. The Sub-Panel furthered its point by supplying an example, whereby a defendant, due to their own belief in their innocence, would want the prosecution to prove its case and therefore not provide a defence case statement. It was argued that a defence on paper could appear different to that which ended up being presented orally in court, and should a defendant feel that they needed to raise a valid point in court

[4] Public hearing with the Minister for Home Affairs – 23 February 2018 – p.20
[5] Public hearing with the Minister for Home Affairs – 23 February 2018 – p.21+22

(which in turn would lead to an acquittal), they would be liable to pay the full costs of the prosecution. After further discussion on this matter, the Attorney General responded as follows –

H.M. Attorney General:

To take your point that you made about the wording in Article 84(5) in relation to prosecution costs: "It is to pay such of the prosecution costs that have been incurred at the date of the court's direction given.". If the inference that you draw from that, which I understand, is that there is a risk of the defendant having to pay all the costs incurred at that date then maybe the solution is for that wording to change so it is costs incurred as a consequence of a failure to comply with Article 84(2) so the cost order would be very much restricted to effectively the costs of the hearing which arose out of it. If someone's prepared to file against a case that was too broad then I am sure we could amend Article 84(5) to restrict its ambit. I see the point that you have identified there.[6]

19. The Sub-Panel is pleased that this issue has been addressed within the amendments to the draft Law brought forward by the Minister for Home Affairs.

Reserve Jurors – Article 66

20. The draft Law introduces the concept of reserve jurors into the Jersey criminal justice system. As it currently stands, in the event that a jury falls below 10 members, the trial would be abandoned. The provisions within the draft Law would allow for 2 reserve jurors to be appointed who would subsequently take the place of any jurors who were unable to continue. The draft Law stipulates that this would be for trials lasting over 5 days.

21. The Sub-Panel received submissions from the Law Society of Jersey and Sir Christopher Pitchers which highlighted objections to this change, based on the unlikely event of a jury falling below 10 members –

Sir Christopher Pitchers:

"I agree with the objections of the Law Society succinctly expressed in paragraph 28 of their Response. The number of trials which have to be aborted because the jury has fallen below the permitted number is vanishingly small. In 43 years of practice as advocate and judge in England, I was never involved in a trial where that occurred. It is true that very long trials are much more common now than they were when I started but even so I would be amazed if discharge of a jury because their numbers had fallen too far was other than an exceedingly rare event in Jersey. Loss of one juror is fairly commonplace and two not unknown. Reserve jurors could be used to fill these vacancies but this is not the situation which this major proposal is designed to deal with."[7]

The Law Society of Jersey:

"*We cannot see the need for reserve jurors in every case. There has been to our knowledge, no more than one trial lost as a result of a Jury falling below the required numbers. That is not sufficient to justify having 14 members*

[6] Public hearing with the Minister for Home Affairs – 23 February 2018 – p.24+25
[7] Written submission – Sir Christopher Pitchers – 10 January 2018

contributing to discussions and potentially influencing their colleagues but then 2 falling out of the process at the summing up stage, having had their say in the decision. The change appears unjustified and unnecessary."[8]

22. The Sub-Panel addressed the issue of the need for reserve jurors during a Public Hearing with the Minister for Home Affairs –

Deputy S.Y. Mézec of St. Helier:

From what we have been told some have found this a quite surprising addition on the basis that they do not think this happens very often at all, even in long trials. Do you know of any numbers of trials where they have come close, so where they have gone down to 10 jurors?

H.M. Attorney General:

I do not think we can put before you a case where the jury has fallen to 9 jurors and the trial has had to be abandoned, but certainly the last significant case we had, last fraud case, the number of jurors I think did reduce to 10 and it is common for the jury number to fall to 11 and occasionally to 10. The concern is that we will end up with a long case, where through sickness or other reasons we will have insufficient jurors to complete the trial with significant cost implications and inconvenience for the witnesses and of course the huge expense in terms of legal fees and court time of another trial.[9]

23. The Attorney General then went on to give further justification for the inclusion of the concept of reserve jurors within the draft Law –

H.M. Attorney General:

The purpose of empanelling jurors is to safeguard against juror attrition, which is how they describe it, in long trials, due to illness or of course finding out they know a defendant or a witness in the trial. It is interesting; the Australian case law indicates a clear preference for a trial with 12 jurors. The stated rationale for this reference is the long historical tradition of a jury being constituted by 12 jurors, a tradition that should not be lightly displaced, as well as the reduction in representativeness that occurs when a jury of 12 is reduced. So that is the purpose of it and I had not appreciated, although we had done lots of research in many areas in relation to this Law, I think I mentioned bad character before and hearsay, but I was not aware until recently that the use of additional or reserve jurors was in fact quite so widespread across the common law world, for reasons that we have articulated.[10]

24. In response to concerns that reserve jurors would be empanelled for long trials which takes them away from their jobs and in the end are not used, the Minister for Home Affairs gave the following response –

[8] Written submission – The Law Society of Jersey – 12 January 2018
[9] Public hearing with the Minister for Home Affairs – 23 February 2018 – p.13+14
[10] Public hearing with the Minister for Home Affairs – 23 February 2018 – p.14

Minister for Home Affairs:

It is an important part of civic duty, is it not, to present oneself for jury service if requested? I think also one of the things that this new law will do is it will also open up the number of people who are eligible for jury service quite considerably and so that also shares the burden among different sectors of the community.[11]

25. Sir Michael Birt and Mr. Julian Clyde-Smith raised an issue in relation to the requirement for reserve jurors for trials over 5 days in length. It was argued that reserve jurors should be required for trials lasting over 10 days in order to mitigate the significant costs that may incur, should the jury fall below 10 members –

"However, trying to balance the costs of wasting time and money on the one hand because reserve jurors are not required with the need to avoid substantial costs and inconvenience in the case of a long trial, we think that a more appropriate period for the expected length of the trial should be 10 days before reserve jurors are appointed."[12]

26. The Sub-Panel raised this issue with the Minister for Home Affairs and questioned what consultation was undertaken to inform the 5-day rule –

Deputy S.Y. Mézec of St. Helier:

We have spoken to some who think it should be more than 5 days, but likewise we have heard from somebody who was aware of a case that was only meant to be 5 days where they went down to 10 and had one person gone and that person ended up being convicted, so that would have been somebody who would have walked free otherwise. Has there been any sort of consultation on that point specifically with those who serve in the judiciary to say "what is the right balance here", if this is the road we are going to go down?

H.M. Attorney General:

The main consultation was the consultation you have had I think in the sense that we did not have any expressions of views prior to you receiving the views you received from the judiciary. The principal source of views as far as we were concerned, in addition to of course the Bailiff saw the draft Law, was the Viscount, she expressed various concerns about administrative consequence of adding additional jurors in every case and it was a consequence of her concerns that led us to put in the 5-day minimum. That was the origin of that for the 5 days because initially we were suggesting that they would be present in every case, 5 days is what the Viscount suggested and the judiciary have suggested a longer period, but the key thing is that they are available to safeguard the risk I have mentioned in very long cases.[13]

27. Upon further consideration of the 5-day rule, the Sub-Panel has agreed that the 5-day rule is appropriate and would only be used in limited cases. The Attorney General gave further opinion on this during a hearing –

[11] Public hearing with the Minister for Home Affairs – 23 February 2018 – p.15
[12] Written submission – Sir Michael Birt and Mr. Julian Clyde-Smith – 9 January 2018
[13] Public hearing with the Minister for Home Affairs – 23 February 2018 – p.15

H.M. Attorney General:

The 'over 10 days' would certainly affect, on past figures, only one trial a year, 5 days it would be between one and 2 trials a year.

28. A further issue in the draft Law was identified in relation to Article 66(8), where in its current drafting the Bailiff was able to dismiss reserve jurors prior to their summing-up of the case. It was highlighted in the submission by Sir Michael Birt and Mr. Julian Clyde-Smith that the Bailiff's summing up could take several days in itself, and therefore it would be more appropriate to extend the period that reserve jurors were required for until the retirement of the Jury to consider its verdict. The Sub-Panel notes that this has been addressed in the second amendment that has been lodged by the Minister for Home Affairs (P.118/2017 Amd.(2)).

Eligibility for jury service – Article 63

29. The provisions in Article 63 lay out the persons who are both eligible and ineligible for jury service. Under the draft Law, the current jury pool would be significantly expanded, with any person between the ages of 18 and 72 who is included on the Electoral Register in accordance with Article 5 of the Public Elections (Jersey) Law 2002, eligible to serve, subject to certain exemptions.

30. Whilst this is to be welcomed, the Sub-Panel has received concerns in relation to paragraph (2)(i), in which it states advocates, solicitors, prosecutors and Centeniers may serve on a jury if they have not been involved with criminal proceedings in the 12 months prior to the trial. The Law Society raised the following concerns in their submission –

    i. *there is a clear risk that the opinion of a lawyer will hold undue sway with other members of the jury, given the actual or presumed knowledge that the lawyer will have about relevant legal matters in the case; and*

    ii. *there is an equally clear risk that the lawyer will have some knowledge about the background of the case, directly or from discussions with other members of the profession, which will means that he or she will be deciding not solely, as the law requires, on the basis of the evidence adduced at trial;*

    iii. *there will be at least the appearance of bias if a lawyer who did mainly defence work or a prosecutor sits on a jury.*[14]

31. The Sub-Panel questioned the Minister for Home Affairs on these concerns and was given the following response –

    Deputy S.Y. Mézec of St. Helier:

    That could add an element of thinking into how a jury works that may or may not be useful and some of them have suggested to us that, to be on the safer side, it is better to exclude those people. Is that something you have considered?

[14] Written submission – The law Society of Jersey – 12 January 2018

Minister for Home Affairs:

It is obviously a point of consideration, but I think the legal community is much bigger than it was in 1864; they perhaps had fewer than 10 lawyers in that time and now we have more than 400 and many of them are not at all involved in criminal proceedings and therefore may not even be that familiar with the court settings because they are largely in a transactional context most of the time in the course of their duties. It is clearly prescribed the incidence that would preclude somebody, a member of the legal community, from being on a jury.[15]

32. Further to the hearing, the Sub-Panel considered bringing forward an amendment to the draft Law to exempt advocates, solicitors, prosecutors and Centeniers from jury service. However, after productive discussions with the Minister and Attorney General, it was agreed that the Minister would bring this forward as part of the second amendment.

Withdrawal of proceedings – Article 82

33. Article 82 creates provision for the Attorney General to recommence previously discontinued criminal proceedings with the leave of the court. It was noted in the Sub-Panel's work that the original drafting of the Article created an unnecessary distinction between 'discontinuance' and 'withdrawal' of proceedings. The Sub-Panel raised this concern with the Attorney General, and is pleased to note that the second amendment has addressed this concern.

Duty of prosecution to disclose unused material – Article 83

34. Article 83 can be seen as the opposite side to Article 84 and the duty to supply a defence case statement. In the original drafting of this Article, the duty is on the prosecution to disclose any unused material unless it is of the view that doing so would not be in the public interest.

35. The Sub-Panel questioned the rationale for including this in the draft Law, much the same as it questioned the inclusion of the defence case statement, and received the following answer in writing –

"It is important that the prosecution should disclose to the defence that it has material in its possession that it will not use to support the case for the prosecution, but which may assist the defence case or undermine the prosecution case. In many cases more information about the circumstance of the offence will come into the possession of the prosecution, through the police investigation of the case, than may be available to the defendant. A miscarriage of justice could occur if evidence that is relevant is obtained by the prosecution and is not made available to the defendant so that, if appropriate, the defendant can present that evidence to the court.

The purpose of the provision in Article 83 of the draft Law is to codify the existing provision in the Attorney General's guidelines on the disclosure of unused material, so that in future there will be a clear statutory obligation on the prosecution with respect to such disclosure."[16]

[15] Public hearing with the Minister for Home Affairs – 23 February 2018 – p.16
[16] Questions on the Criminal Procedure (Jersey) Law 201- - p.2

36. A point was raised in the submission made by Sir Michael Birt and Mr. Julian Clyde-Smith that the current drafting of the law reverses the current position whereby the judge determines what material is disclosed and which is not due to public interest:

> *"In our view the provision should be changed so as to preserve the current position and provide that the prosecution need not disclose unused prosecution material where it considers it would not be in the public interest to do so only if the court agrees. That would ensure that such matters have to go before a judge as at present, rather than the position under Article 83(3) which would enable a prosecution to withhold such material unless the court ordered otherwise. If the prosecution never tell the court about such material, the court will not 'order otherwise'."*[17]

37. The Sub-Panel notes that this change has been accepted by the Minister for Home Affairs and is included in the second amendment that has been brought forward.

Warning of witnesses as to attendance at court – Article 98

38. Article 98 of the draft Law prescribes the procedure to be followed should a witness fail to turn up at the court on the date and time as laid out in the summons. In current Jersey law, if a witness fails to attend, then they may be arrested as well as fined. This means that a trial is rarely delayed because of witnesses failing to turn up. The Article however, changes this so that a warning is issued prior to any arrest being authorised.

39. The Sub-Panel received a submission from Sir Michael Birt and Mr. Julian Clyde-Smith that suggested maintaining the current position –

> *"We think that Article 98 should be amended so as to preserve the current power of arrest. Otherwise, the only remedy when a witness fails to appear would be to issue a witness summons under Article 99. Furthermore, Article 98 should be expanded so as to replicate the current position and enable witnesses for the defence whose names are given to the Attorney General also to be warned under Article 98."*[18]

40. The Sub-Panel notes that this amendment has been brought forward by the Minister for Home Affairs.

Schedule 3 – Part 9A – Evidence of bad character

41. Within Schedule 3 of the draft Law, amendments are made to the PPCE Law to allow for the inclusion of evidence of bad character to show the propensity of a defendant to commit similar acts. It is worth noting that this is only in the case that a person has made an attack on another person's character. The Sub-Panel questioned the rationale for this inclusion in the draft Law and received the following answer –

[17] Written submission – Sir Michael Birt and Julian Clyde-Smith – 9 January 2018
[18] Written submission – Sir Michael Birt and Julian Clyde-Smith – 9 January 2018

"The rationale is to achieve more just outcomes. There are numerous examples where jurors who have acquitted a defendant are genuinely shocked to hear of a long list of similar offences which the defendant has committed. This is a particular issue as it gives serial domestic abusers and professional criminals a fresh start with every offence."[19]

42. Concern had been raised by the Law Society of Jersey that this particular change to the law was heavily in favour of the prosecution and could be seen as prejudicial. It was also explained to the Sub-Panel that this particular change could expand the evidence that would be admissible outside of the current system whereby evidence has to bear a striking similarity. The Sub-Panel raised this concern with the Community and Constitutional Affairs Department and received the following answer –

"In response to the suggestion that this will be too widely cast, evidence of bad character will be admissible only at the discretion of the Court, and not all previous conduct will be admissible. For instance, if a defendant was charged with indecent assault, and had a history of indecent assaults and other offences such a drink-driving, then the indecent assaults might be seen as relevant but it is unlikely that the drink-driving would be. The objective is to enable the court to be informed if the defendant has a propensity to commit offences of the same nature as those for which the defendant is being tried. The objective is not to provide a full criminal history to sway the court to convict.

This will correct a current unfairness in Jersey law where the defendant's criminal history must remain secret in most cases but the defence can list any offences committed by prosecution witness to raise doubts about their character and likely truthfulness."[20]

43. The Sub-Panel questioned what consultation was undertaken on the proposals in relation to bad character evidence, and received the following answer –

"In terms of the general consensus, some respondents were supportive, some against and some neutral. On balance the more involved a respondent was with defence work the more suspicious they were of the proposals. The Law Society does not support the change, and its opinion is of interest and is perfectly valid from their own perspective but ultimately it is the voice of one interest group amongst many. In this particular case the Society's advice was not taken, although its position was accepted in a number of other areas."[21]

44. A point was raised by Sir Michael Birt and Mr. Julian Clyde-Smith that the current drafting of the new Article 82G(1) in the Law contained a drafting point as follows –

"We think that the words "it is evidence that" are unnecessary and indeed do not make sense. They should simply be omitted. As drafted the provision says that the evidence of bad character is admissible if it (i.e. the evidence of bad character) is evidence that the defendant has made an attack on another person's character. That is nonsensical. The evidence of bad character is

[19] Questions on the Criminal Procedure (Jersey) Law 201- - p.2
[20] Questions on the Criminal Procedure (Jersey) Law 201- - p.2
[21] Questions on the Criminal Procedure (Jersey) Law 201- - p.2

evidence of previous convictions, etc. The making of an attack on another person's character is the ground upon which evidence of the defendant's bad character can be adduced. Paragraph (1) should therefore read – ***Evidence of a defendant's bad character is admissible if the defendant has made an attack on another person's character."***[22]

45. This point has been addressed in the amendment (P.118/2017 Amd.(2)) lodged by the Minister for Home Affairs.

Conclusion

46. In conclusion, the Sub-Panel is generally supportive of the draft Law. The Sub-Panel is pleased that the majority of the suggestions that have been put to it during its review have been taken forward by the Minister for Home Affairs and subsequent amendments have been made. The Sub-Panel supports the amendments that the Minister has brought forward.

47. The Sub-Panel has brought forward an amendment to the draft Law in respect of retrials and would recommend that Members support it.

48. The Sub-Panel would like to thank all those who made submissions to its review.

49. Finally, the Sub-Panel would like to place on record its thanks to the Minister for Home Affairs and her Officers, H.M. Attorney General and the Law Officers' Department, and the Law Draftsman for their co-operation and support throughout its review. The Sub-Panel believes that this has been a positive piece of legislative scrutiny and the co-operation has helped to strengthen an important piece of legislation.

50. The Panel therefore supports the Proposition as amended by the Second Amendment, with the exception of Article 75 (retrials), in respect of which the Panel has proposed its own amendment.

[22] Written submission – Sir Michael Birt and Mr. Julian Clyde-Smith – 9 January 2018